

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL STEVEN BRANDT,

Defendant-Appellant.

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UNPUBLISHED

July 26, 2007

No. 267990

Antrim Circuit Court

LC No. 05-003863-FC

Before: Meter, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from his sentence of 22 months to 15 years in prison imposed after his jury conviction of unlawful taking or use of a motor vehicle, MCL 750.414. We affirm.

Defendant was charged with unlawful driving away of an automobile, MCL 750.413, as a result of his driving a car belonging to Cynthia Somerville. Defendant lived in the home of Tim Hague, his longtime friend, and Somerville, Hague's girlfriend. Somerville owned a car, but did not drive because she is legally blind. Somerville indicated that defendant had never asked to use her car, that she had never expressly told defendant that he could not drive her car, and that she had never given defendant permission to use her car. Hague testified that he did not give defendant permission to drive Somerville's car.

Defendant testified that he drove Somerville's car on occasion and with Somerville's permission. Defendant stated that Somerville never told him that he was not permitted to drive her car. Defendant acknowledged that he drove the car on December 16, 2004, and asserted that he believed that he had permission to do so. Defendant admitted that on the occasions he drove the car, neither Somerville nor Hague saw him do so. The jury found defendant guilty of unlawful taking or use of a motor vehicle as a lesser included offense of unlawfully driving away a motor vehicle.

The sentencing guidelines, as scored by the trial court and adjusted for defendant's status as a fourth-offense habitual offender, MCL 769.12, recommended a minimum term range of zero

to 22 months.<sup>1</sup> Defendant objected to the scoring of offense variable (OV) 10, MCL 777.40, exploitation of vulnerable victim, at ten points, arguing that no evidence supported the scoring because Somerville was not aged, physically disabled, etc. The trial court upheld the scoring of OV 10 at ten points on the ground that defendant exploited a domestic relationship to gain access to Somerville's car, and it sentenced defendant to 22 months to 15 years in prison, with credit for 129 days.<sup>2</sup>

In calculating the sentencing guidelines, the trial court has discretion to determine the number of points to be scored, provided that evidence in the record supports a particular score. A scoring decision for which there is any evidence in the record will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

OV 10 is to be scored at ten points if the defendant "exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b). The term "exploit" is defined as "to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b). The term "vulnerability" is defined as "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c).

Defendant argues that the trial court abused its discretion by scoring OV 10 at ten points, asserting that no evidence showed that he exploited Somerville's vulnerability. Defendant notes that had OV 10 been properly scored at zero points, the guidelines would have recommended a minimum term range of zero to 18 months.<sup>3</sup> Defendant concludes that because his minimum term exceeded the properly scored guidelines, he is entitled to resentencing.

We disagree. Somerville clearly testified that she never gave defendant permission to drive her car. Defendant testified that he drove the car on occasion, and while he maintained that Somerville was aware of this fact, he also acknowledged that she was always asleep or elsewhere when he did so. The evidence supported a finding that defendant exploited his domestic relationship with Somerville to gain access to her car. MCL 777.40(3)(b). The trial court did not

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<sup>1</sup> If the upper limit of the guidelines range exceeds 18 months and the lower limit is 12 months or less, the trial court shall sentence the defendant, absent a departure, to prison with a minimum term within the range, or to an intermediate sanction that may include a term of imprisonment that does not exceed 12 months. MCL 769.34(4)(c). An intermediate sanction does not include a prison term. MCL 769.31(b); *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002).

<sup>2</sup> The trial court mistakenly believed that the prison sentence constituted a departure from the guidelines and thus completed a sentence departure evaluation.

<sup>3</sup> If the upper limit of the recommended guidelines range is 18 months or less, the trial court must impose an intermediate sanction unless it states on the record that a substantial and compelling reason exists to commit the defendant to the Department of Corrections. MCL 769.34(4)(a). To constitute a substantial and compelling reason for departing from the guidelines, the reason must be objective and verifiable, and must irresistibly hold the attention of the court. *People v Babcock*, 469 Mich 247, 257-261; 666 NW2d 231 (2003).

abuse its discretion by scoring OV 10 at ten points. *Hornsby, supra* at 468. Defendant is not entitled to resentencing.<sup>4</sup>

Affirmed.

/s/ Patrick M. Meter  
/s/ Kirsten Frank Kelly  
/s/ Karen M. Fort Hood

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<sup>4</sup> Moreover, if a defendant has already served the minimum sentence under the guidelines, the issue of whether the range was properly calculated is moot and need not be addressed on appeal. *People v Tombs*, 260 Mich App 201, 220; 679 NW2d 77 (2003), aff'd 472 Mich 446; 697 NW2d 494 (2005). The Michigan Offender Tracking Information System indicates that defendant has been paroled. We therefore conclude that defendant's argument regarding the correct scoring of the guidelines is essentially moot and that defendant would not be entitled to relief even if the guidelines *had* been miscalculated in the manner that defendant suggests.